IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 403 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

G.P. SINHA GENERAL MANAGER (SOUTH ASIA)

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 403 of 2001

MR RS SANJANWALA with Mr S H Sanjanwala for Petitioner No. 1

Ms N V Joshi, APP for Respondent No. 1

MR MC BHATT for Respondent No. 2

MR DM BHATT for Respondent No. 2

RULE NOT RECD BACK for Respondent No. 3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 26/03/2003

ORAL JUDGEMENT

The petitioner above named, has preferred this Criminal Misc.Application under section 482 of the Criminal Procedure Code, 1973 (for short, 'the Code') for quashing and setting aside Inquiry Case No.18/2000 filed in the court of the learned Judicial Magistrate First Class, Sanand and for quashing and setting aside M.Case No.15/2000 of Sanand Police Station and for quashing and setting aside the order on 29.5.2000 in Inquiry Case No.18/2000 passed by the learned Judicial Magistrate First Class at Sanand. It seems that the aforesaid Inquiry and M.Case was filed by the second respondent before the learned Judicial Magistrate First Class, Sanand. A copy of the said complaint has been placed at page 16, Annexure 'A' to the petition.

2. According to the case of the contesting respondent in the said criminal case, the contesting respondent has been serving as General Manager in a Limited Company named in the complaint and the said company has been manufacturing clothes of different nature. That a consignment was entrusted by the said Company for being carried and delivered to accused No.1 and 2 and the said consignment was entrusted to accused No.3 i.e. the petitioner for the purpose of being carried to the consignee. It is also contended by the contesting respondent in the said criminal complaint that the consignment was to be delivered to the concerned consignee i.e. accused No.1 and 2 on submission of the papers and the papers could be cleared only on payment of due amount. It is the contention of the said contesting respondent that the four accused persons committed criminal conspiracy and as a part of the said criminal conspiracy, the said consignment was delivered by the petitioner to the consignee without the papers being released and without the payment being made. That thereby, the petitioner and other accused committed offence punishable under section 420, 407 and 120-B read with section 114 of IPC. Therefore, the said complaint was filed before the said court and thereafter the trial court has passed order dated 29.5.2002 requiring the complaint to be referred to the police station for investigation under section 156(3) of the said Code. Therefore, the said police station has registered the said FIR as M.Case.

3. The present petitioner is original accused no.3 in the said matter and it has been contended here that the court where the complaint is filed, has no jurisdiction to entertain the complaint and, therefore, the court could not pass an order for investigation under

section 156(3) of the Code. That no offence can be said to have been committed by the present petitioner and, therefore, the learned Magistrate has not applied his mind before referring the complaint for investigation to the concerned police station. That it may, at the most, amount to a civil dispute. Therefore, also no investigation could have been ordered by the trial court. That therefore, the aforesaid complaint and the aforesaid FIR are illegal and deserve to be quashed and set aside. The petitioner has, therefore, prayed to quash and set aside the complaint and the FIR.

4. It seems that on receipt of the present application, notice was issued and in response to the service of notice, Mr M C Bhatt, learned Advocate appears on behalf of the contesting respondent and Ms N V Joshi, learned APP for the State. I have heard the learned Advocates for the parties and perused the papers.

5. Mr R S Sanjanwala, learned Advocate, on behalf of the petitioner, has contended that no part of action has taken place within the jurisdiction of the learned Judicial Magistrate First Class, Sanand and, therefore, the said court could not have been taken cognizance of the offence and, therefore, the order in question is illegal on the face of it on the ground of want of jurisdiction. The question of jurisdiction may, at times, to be a mixed question of law and fact and, therefore, it would not be open to this court to enter into that area for the purpose of deciding this petition. Even otherwise, the contesting respondent has made it clear that the consignment was entrusted to the petitioner at Sanand and a document to this effect has been produced by the contesting respondent at page no.45 to show the said position. Considering the aforesaid aspects of the case and considering the said document at page 45, it cannot be said prima facie, that no part of cause of action for filing the said complaint has arisen within the territorial jurisdiction of the Court in question. Therefore, the question of jurisdiction will not come in the way of the present contesting respondent, prima facie.

6. It is then contended that it is a matter of civil dispute and there is no element of any criminality. On going through the complaint which has been produced by the petitioner along with the present petitioner at page No. 16 at Annexure 'A', it is very clear that the complainant has made allegations in the said complaint that the transporter had taken he petitioner in confidence and, therefore, the said consignment was

entrusted to the transporter, but thereafter the transporter as well as the consignee both have entered into criminal conspiracy and delivered the goods to the consignee without getting realised the papers. Therefore, the allegations of cheating have been made in the complaint and, therefore, it cannot be said that no offence is prima facie, made out against the petitioner.

7. It is then contended by Mr Sanjanwala, learned Advocate for the petitioner that it may amount to a wrong delivery of consignment which may result in civil disputes. In such transactions, civil dispute may also simultaneously arise. There cannot be any difficulty or dispute about the same. But at the same time, it is required to be decided as to whether over and above civil dispute there is criminality involved in the transaction. When allegations of criminality are present in the complaint, then in that event, there is nothing wrong if investigation is undertaken by the Investigating Officer and appropriate action is taken by him and the investigation will reveal as to whether civil dispute outweighs criminal dispute or criminal disputes outweighs civil dispute. However, when allegations of criminality are present in the complaint, a complaint cannot be treated to be civil dispute and civil dispute only.

8. It is then contended that the consignee did not accept the consignment and, therefore, as per the contract, the consignment in question was delivered to a Godown as per the instruction and with the knowledge of the present petitioner. Now, the records do not show that some instruction was issued by the present contesting respondent to the petitioner to the effect that the consignment may be kept at some Godown. It is not on record that the consignment was kept at some Godown with the knowledge of the contesting respondent. Again, this will be a disputed question of fact which can be dealt with and decided by the Court concerned, if charge sheet is filed and charge is framed against the present petitioner. It has then been contended that the offence punishable under section 406 of IPC and the one punishable under section 420 of IPC cannot go together. This is again a matter which can be decided at the stage of investigation or at the trial. In that view of the matter, it would be for the Investigating Officer to consider and opine as to whether this is a case of an offence punishable under section 406 or whether this is an offence punishable under section 420 of IPC. Even if the opinion of the Investigating Police Officer is this way or that way, it would again be the duty of the Court concerned to prima facie, find as to what offence is

committed in the case. Therefore, simply because these two offence may not go together and simply because they are clubbed together, it would not be a ground for quashing and setting aside the complaint.

9. It has then been pointed out that the petitioner is only a General Manager of the Company dealing with so many branches in and outside the country and, therefore, he will not be personally responsible for the offence in question. When the allegations are made against the petitioner, it has to be investigated and on investigation, it may be ascertained as to whether there was any involvement of the petitioner in the offence in question. Simply because he is the General Manager and simply because the company has so many branches to look after, it cannot be said that the General Manager has not committed any offence. It has then been contended that the present petitioner has not gained anything out the transaction in question. Whether the petitioner has gained something or not is again the subject matter of dispute which is also a subject matter of investigation and this is not the stage at which this Court should decide the issue this way or that way.

10. The learned advocate for the petitioner has also argued that the learned Magistrate has not recorded a speaking and a reasoned order, for referring the complaint to the Police Station for investigation, under Section 156 (3) of the said Code. For the said purpose, he has referred to the order, which is placed at Page 23. There is no dispute that the order impugned is not a reasoned and a speaking one. He has argued that when the order is not a reasoned and a speaking one, it would not indicate as to whether or not, the learned Magistrate had applied his mind to the facts and circumstances of the case. In support of the said argument, the learned Advocate for the petitioner has relied upon a decision of this Court in the case of Suresh Kumar Gupta Vs. State of Gujarat reported in 1997(2) GLH 356, wherein the learned Single Judge of this Court, has clearly observed that it is the duty of the learned Magistrate to decide whether any investigation is necessary in the matter or not. The learned Single Judge has also observed that whenever a direction to inquire under Section 156(3) of the Code is given, the said order of direction should be a speaking one.

11. The learned Single Judge has also observed in Para 15 that every Magistrate shall record a short order disclosing the reason as to why he needs investigation under Section 156(3) of the Code, through police agency.

He, however, observed that in absence of any such reasons, the order to direct inquiry under Section 156(3) of the said Code, shall be treated as bad.

12. However, it would be relevant to consider an old decision of this Court, reported in the case of Kanaksinh Hathisinh Jadeja & Ors. Vs. Balbhadrasinh Narendrasinh Jhala & ANR reported in 1987(2) GLR 1219. There also the complaint ordered to be referred for police investigation under Section 156 (3) of the Code, was under challenge. The learned single Judge had held that reasons are not required to be recoarded for sending a complaint under section 156(3) of the Code for police investigation.

13. These two judgments were required to be considered again, by this Court, in Criminal Misc. Application Nos. 658 of 1998 and 663 of 1998. The learned Judge, (R. M. Doshit, J.) while disposing of the said two Criminal Misc. Applications, observed that in the matter of Sureshkumar (Supra), the earlier judgment in the matter of Kanaksinh (Supra) was not brought to the notice of the learned Single Judge and the learned Single Judge, therefore, had no opportunity to consider the binding precedent in the matter of Kanaksinh (Supra). That the judgment in the matter of Sureshkumar (Supra) in so far as it holds that the order directing police investigation under subsection 3 of Section 156 of the said Code shall be a speaking order and the learned Magistrate shall record reasons, therefore, is per incuriam.

14. In above view of the matter, an order of the learned Magistrate cannot be treated to be illegal, on a solitary ground that it is not a speaking or a reasoned order, in view of the aforesaid two decisions of this Court.

15. The learned Advocate for the petitioner has also contended that the petitioner is simply a General Manager of a company and had nothing to do with the allegations made in the complaint against the petitioner. The investigation has to be carried out and it would be open to the petitioner to plead during investigation that he had no role to play in the matter. But, by mere statement in this petition that he was not required to do anything in the matter, would not be sufficient to quash the complaint, by exercising jurisdiction under Section 482 of the Said Code. It is more so when he is holding a position in the Company as a General manager in the said company and allegations have been made against him.

16. Then certain other decisions were also relied upon. In Pepsi Foods Ltd. And Another Vs. Special Judicial Magistrate And Others, reported in 1998 (5) SCC, 749, it has been observed that while summoning the accused, the order should show that the Magistrate has applied his mind to the facts of the case and also applicable thereto. Therefore, ultimately it would be open even to this Court, to find out as to whether the allegations made in the complaint, prima facie, show the involvement of the accused in some offence or that the complaint makes out some offence against the accused.

17. On the other hand, Kanti Bhadra Shah And Another Vs. State of West Bengal, reported in 2000 (1) SCC, 722 goes to the extent of saying that reasoned order need not be recorded while issuing process. It further says that reasons are not required to be recorded for framing the charge. At the same time, in the case of discharge of the accused, reasons are required to be recorded.

18. In Central Bureau of Investigation, SPE, SIU(X), NEW DELHI Vs. Duncans Agro Industries Limited, Calcutta, reported in 1996(5) SCC, 591, it was observed that Civil and Criminal Proceedings can go ahead simultaneously.

19. In Ajay Mitra Vs. State of MP & Ors., reported in JT 2003(1) SC, 418, the allegations made in the complaint did not constitute any offence against the appellants. In that view of the matter, the complaint was required to be quashed. There cannot be any dispute about the same, but the thing remains that the Court should scrutinize the complaint on prima facie basis and should find out whether the complaint makes out a prima facie offence against the accused persons or not.

20. In Trisuns Chemical Industry Vs. Rajesh Agarwal and Ors., reported in 1999 SC, 3499, the Hon'ble, The Supreme Court has observed that simply because there is a remedy for referring the dispute to arbitration, it would not be a ground for quashing of FIR, in exercise of the powers under Section 482 of the Code. It further states that even quashing cannot take place on the ground that the concerned Magistrate has no territorial jurisdiction to take cognizance of an offence. It is, further, observed that the power of the Magistrate to take cognizance of an offence, is not impaired by territorial restrictions.

21. It has further been argued by the learned Advocate for the petitioner that there were in all five consignment and the offence is said to have been

committed only with respect to one consignment. It is further contended that despite the present alleged offence, the contesting respondents have been dealing with the said consignee again. This would be a dispute between the petitioner, the consignor and the consignee. Simply because the complaint has been filed even against the consignee, it would not mean that the contesting respondents should not undertake further contract with the consignee, who is also an accused before the learned Magistrate, in the aforesaid complaint. Anyway, this would not be a ground for quashing the complaint in question. In other words, simply because the contesting respondents are still dealing with the consignee, it cannot be a ground for quashing the complaint. The only consideration pertaining to this would be as to whether the complaint makes out an offence or not. On a bare perusal of the complaint, it prima facie appears that there are allegations in the complaint, showing that all the accused have joined hands and have cheated the present contesting respondents, by delivery of the disputed consignment to the consignee through the transporter, without getting the value of the consignment. So, on the one hand, it may amount to a breach of contract and on the other, on the basis of the allegations in the complaint, it prima facie appears that the complainant, has made out a case of offence against the present petitioner and therefore, the petition cannot be quashed.

22. In UP Pollution Control Board Vs. M/s. Mohan Meakins Ltd. reported in 2000 CLJ 1799, the Hon'ble, The Supreme Court has observed that the process issued to the accused cannot be quashed, simply on the ground that the Magistrate had not passed a speaking order.

23. The learned Advocate for the petitioner has also referred to a condition of the TERMS AND CONDITIONS OF P & O NEDLLOYD BILL OF LADING. Clause 2 thereof can be reproduced for ready reference as follows;

NOTIFICATION AND DELIVERY:

(2) "The Merchant shall take delivery of the goods within the time provided in the Carrier's applicable Tariff [see Clause 2]. If the Merchant fails to do so the Carrier shall be entitled, without notice, to unpack the Goods if packed in container and/or to store the Goods ashore, afloat, in the open or under cover, at the sole risk of the Merchant. Such storage shall constitute due delivery hereunder and

thereupon the liability of the Carrier in respect of the Goods stored as aforesaid shall wholly cease, and the costs of such storage (if paid or payable by the Carrier or any agent or Sub-Contractor of the Carrier) shall forthwith upon demand be paid by the Merchant to Carrier".

24. On the basis of the said condition, it has been argued that the present petitioner had observed the said condition and therefore, he is not responsible to answer the complaint of the contesting respondents. When allegations are made against the petitioner in the complaint, it would be open to the petitioner to refer this condition, to the investigation officer. Naturally, the investigation officer would deal with the same during the course of the investigation. But the complaint cannot be quashed on the ground mentioned in condition no. 2. Moreover, whether or not the petitioner has performed his part in accordance with condition no. 2, is again a question of fact, which can be dealt with and decided at the trial or at least at the stage of investigation. Anyway, in my opinion, there are allegations in the complaint which show that the offences set out in the complaint, have been made out against the petitioner, prima facie and therefore, when a prima facie case has been made out in the complaint, it is not open to this Court, to quash the complaint.

25. It is required to be considered that the process can be quashed only in a rare case, when ex-facie no offence has been made out on a bare perusal of the complaint. The truthfulness or otherwise of the allegations made in the complaint, cannot be gone into at this stage. The complaint has to be read on its face value. The allegations made in the complaint are required to be accepted, as they stand prima facie, for the purpose of deciding the issue. If, on a bare reading of the complaint, no offence is made out, then certainly this Court can exercise inherent jurisdiction vested in it under Section 482 of the Code and can quash the complaint or FIR. At the same time, if some offence is made out on a bare perusal of the complaint or FIR, then such a compliant or FIR, cannot be quashed, by invoking inherent jurisdiction under Section 482 of the said Code. The sufficiency of evidence or material cannot also be gone into, at this stage. Considering the above position, I am of the view that on a bare perusal of the complaint, it cannot be said that no offence is made out against the petitioner and consequently, the petition cannot be quashed qua the petitioner also.

26. For the foregoing reasons, there is no merit in the present application and consequently, it deserves to be dismissed. In above view of the matter, this application is ordered to be dismissed. Rule is discharged.

27. At this stage the learned Advocate for the petitioner states that the petitioner would like to carry the matter to appropriate forum and therefore, the interim relief granted earlier, may be continued for some time. After hearing, it is directed that the Interim Relief shall continue for a further period of FOUR WEEKS from today. Direct Service permitted.

Date: 26.3.2003 [D P Buch, J.]
msp